Supreme Court, U.S.
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No. 95-

In the Supreme Court of the United States

OCTOBER TERM, 1995

WINSTON & STRAWN, *Petitioner*

v.

HYATT REGENCY PHOENIX HOTEL COMPANY, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Arizona

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a $3 million punitive exaction in a case of pure vicarious liability is so excessive as to violate the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

In addition to the named respondent, Hyatt Regency Phoenix Hotel Company, the following were plaintiffs below and are respondents in this proceeding: Nametco Corporation; Barry Shapiro; Lawrence J. Shapiro; Michael S. Haskes; Ben Klimist; Northern Trust Company of Arizona, personal representative of the estates of Sam Shapiro, deceased; and National Metals Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Winston & Strawn respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Arizona in this case.

OPINIONS BELOW

The opinion of the Superior Court of Maricopa County (App., *infra,* 50a-56a) is unreported. The opinion of the Court of Appeals of Arizona (App., *infra,* 1a-49a) is reported at 907 P.2d 506. The order of the Supreme Court of Arizona denying the petition for review (App., *infra,* 57a-58a) is not separately reported, but is noted at 907 P.2d 506.

JURISDICTION

The court of appeals issued its judgment on March 7, 1995. App., *infra,* 1a. The Arizona Supreme Court denied Winston & Strawn's timely filed petition for review on December 19, 1995. App., *infra,* 57a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

STATEMENT

Two threads run through virtually all modern-day punitive damages cases involving organizational defendants: imposition of punitive damages for conduct that often is minimally wrongful and single-minded emphasis on the defendant's substantial financial condition in setting the amount of punishment. It is hard to imagine a starker example of that pattern than the present case. All four of the judges that reviewed the verdict agree that Winston & Strawn did nothing wrong at all; it was held liable for $3 million in punitive damages on a pure vicarious liability theory. Moreover, the Court of Appeals' principal (if not exclusive) basis for upholding this hefty $3 million "punishment" was the fact that the exaction is not an overly large percentage of

Winston & Strawn's gross revenues. No real consideration (only lip service) was given to whether this kind of massive vicarious penalty is reasonably related to the state's interests in retribution and deterrence. Indeed, it simply is impossible to justify the penalty by reference to either of those objectives. This case thus exemplifies the need for this Court to continue the process of articulating the constitutional limits on punitive damages.

1. *The Development of the Phoenix Hyatt Regency.* Respondent Hyatt Regency Phoenix Hotel Company ("HRP") was a limited partnership formed to develop a Hyatt Regency hotel in Phoenix, Arizona. App., *infra,* 2a. The other respondents were general partners in HRP. In December 1973, HRP retained Chanen Construction Company ("Chanen") to serve as the general contractor for the hotel. *Id.* at 2a; 5/7 Tr. 83; P. Exh. 2.[1] The parties' contract was an American Institute of Architects ("AIA") "Standard Form of Agreement between Owner and Contractor," and the basis of payment was the cost of work plus a fee. App., *infra,* 2a; 5/7 Tr. 11-12; P. Exh. 2. As part of the agreement, HRP and Chanen adopted the AIA "General Conditions of the Contract for Construction." P. Exh. 2, AIA Document A201. Among other things, that contract obligated Chanen to indemnify HRP for claims and losses caused in whole or part by the negligence of Chanen or one of its subcontractors. *Id.* ¶ 4.18.1. The contract also unambiguously provided that any dispute between HRP and Chanen would be resolved through arbitration, not in court. *Id.* ¶ 7.10.1.

On July 11, 1974, Chanen signed an Equipment Lease with Form-Eze Systems, Inc. ("Form-Eze"), pursuant to which Form-Eze agreed to furnish certain equipment — primarily, metal forms for concrete, structural columns,

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[1] Because each day of the trial transcript was separately paginated, we cite the transcript by date and page number. Thus, the designation "5/7 Tr. 83" refers to page 83 of the May 7, 1991 transcript.

beams, and decks — for the construction of the hotel. App., *infra,* 2a; P. Exh. 5. Chanen and Form-Eze also entered into a Labor Guarantee Agreement, under which Form-Eze guaranteed that the cost of all necessary labor would not exceed a specified amount (P. Exh. 6), and a Letter of Clarification providing that Form-Eze's material on the site would serve as security for the Labor Guarantee Agreement (P. Exh. 7). Chanen signed all of the purchase orders, including the one for the Equipment Lease, as "Agent for Hyatt Regency Phoenix Hotel Company." P. Exh. 4; 5/7 Tr. 24-25.

Form-Eze soon fell significantly behind schedule for its work on the hotel. App., *infra,* 3a. In November 1974, Chanen removed Form-Eze's supervisor from the job, but it continued until July 1975 to use Form-Eze's forms to construct the hotel. App., *infra,* 3a; 5/7 Tr. 28-30, 57, 63. On August 5, 1995, Chanen's project manager, James Raine, wrote to Barry Shapiro, HRP's managing general partner, to inform him that the cost of setting the forms had exceeded the guaranteed cost by $215,826. Raine expressed his opinion as a "layman[]" that "Form-Eze owes us a lot of money" and specifically requested "direction" from Shapiro (who is a lawyer) about what course of action to pursue. P. Exh. 19; 5/7 Tr. 63-64. The very next day, Shapiro wrote to Raine that "subject to my talking to Art Greenfield [the attorney who was advising both HRP and Chanen on matters relating to Form-Eze] when he returns [from a trip], it would appear that the direction which we should pursue with Form-Eze is to continue to hold the forms * * * as a means of leverage in collecting at least some of the excess dollars which you figure they owe us." P. Exh. 20; 5/7 Tr. 64-65; 5/8 Tr. 14. Chanen then took the forms from the job site to a storage area owned by respondent National Metals Company, another entity controlled by the Shapiro family. 5/7 Tr. 65-67.

At some point thereafter, Greenfield, who was then a partner at the firm of Snell & Wilmer, consulted with Jon

Cohen, a Snell & Wilmer lawyer who specialized in security interests and liens under the Uniform Commercial Code, regarding the validity of HRP's and Chanen's security interest in the forms. 5/14 Tr. 109-111. Cohen advised Greenfield that retaining the forms to assert a possessory lien was appropriate. *Id.* at 111. Greenfield conveyed that advice to Barry Shapiro. *Ibid.*

2. *Form-Eze Sues Chanen and HRP.* In December 1974, Form-Eze filed suit against Chanen in New Mexico state court alleging that Chanen improperly used its forms and improperly barred Form-Eze's supervisor from the site. Chanen retained Greenfield to represent it in the lawsuit. 5/7 Tr. 35-36; 5/14 Tr. 82, 95. Snell & Wilmer had represented Chanen previously, and Greenfield was a member of the company's board of directors. 5/7 Tr. 42; 5/14 Tr. 83, 91-93. On Greenfield's motion, the court dismissed the case for lack of personal jurisdiction. 5/7 Tr. 57; 5/14 Tr. 96; 5/15 Tr. 60; P. Exh. 15. HRP paid Snell & Wilmer's invoice for Greenfield's services to Chanen in the New Mexico suit. 5/14 Tr. 96-97.

On July 29, 1975, Form-Eze filed suit against both Chanen and HRP in federal court in Phoenix. P. Exh. 18.[2] Form-Eze alleged that the defendants breached the Equipment Lease by failing to pay $126,281 for use of the forms and that they breached the Labor Guarantee Agreement by, *inter alia,* refusing to cooperate with Form-Eze's job supervisor and by barring him from the site, for which it sought $60,100 in damages. *Ibid.* Form-Eze further alleged that Chanen "was and is the duly appointed and acting agent of [HRP] and dealt with Form-Eze in that capacity." *Id.* at 2. On August 22, 1995, Form-Eze amended its complaint to add a tort claim, alleging that the defendants had wrongfully refused to return the leased equipment. P. Exh. 23, at 5-7.

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[2] The complaint also named the general partners of HRP as defendants. See P. Exh. 18.

3. *HRP and Chanen Retain Greenfield.* HRP and Chanen each retained Greenfield to defend the case. 5/7 Tr. 109-110; 5/14 Tr. 98-100. Greenfield's firm, Snell & Wilmer, had represented the Shapiro family, the general partners of HRP, since the 1940s, and Greenfield had personally handled several matters for the Shapiros and had socialized with them. 5/7 Tr. 77-78, 84; 5/14 Tr. 83-91. At the time he retained Greenfield on HRP's behalf, Barry Shapiro did not believe that there was any conflict of interest in Greenfield's representation of both Chanen and HRP because "[their] interests were the same" — namely, to defeat Form-Eze's claims. 5/8 Tr. 51.

On September 24, 1975, Greenfield filed an answer on behalf of both defendants, admitting that "Chanen was acting as agent for and on behalf of its disclosed principal, HRP," but denying that either defendant had breached either the Equipment Lease or the Labor Guarantee Agreement. P. Exh. 26, at 2-6. Throughout the Form-Eze litigation, Greenfield adhered to the position that Chanen was not liable *with respect to the contract claims* because it signed the contract as agent for a disclosed principal, HRP. 5/14 Tr. 30; 5/15 Tr. 76.[3]

Greenfield's answer also denied liability for the tort claim on the ground that the defendants were entitled to maintain possession of the leased equipment as security for Form-Eze's default under the Labor Guarantee Agreement. P. Exh. 26, at 6-7. The answer also asserted a counterclaim on behalf of Chanen and HRP alleging that Form-Eze owed $211,528 for cost overruns. P. Exh. 26, at 8-11.

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[3] Under Arizona law, an agent who signs a contract on behalf of a disclosed principal is not liable for the principal's breach of that contract. See App., *infra*, 4a n.1; *Ferrarell* v. *Robinson*, 465 P.2d 610, 612 (Ariz. Ct. App. 1970). Importantly, however, this immunity does *not* extend to tort claims. 5/13 Tr. 61.

In January 1976, Inryco, Inc. ("Inryco") intervened, alleging that it had purchased the forms from Form-Eze in December 1974 and that Chanen and HRP had refused to deliver the forms to Inryco. P. Exh. 30. Inryco, like Form-Eze, alleged that Chanen had acted as the agent of HRP in dealing with Form-Eze. *Id.* at 2. In the answer to the complaint in intervention, Greenfield again admitted on behalf of Chanen and HRP that "Chanen was acting as Agent for and on behalf of its disclosed principal, HRP." P. Exh. 38, at 2.

On July 8, 1976, Greenfield moved on behalf of Chanen for judgment on the pleadings with respect to the breach of contract claims, arguing that, because Chanen was acting as the agent of a disclosed principal, it could not be liable for the principal's alleged breach of contract. He did not seek judgment on the tort claim under this theory. P. Exh. 49. The court denied the motion. 5/9 Tr. 33.

4. *Chanen and HRP Arbitrate Their Disputes Using Separate Counsel.* While the Form-Eze case was pending, disputes arose between Chanen and HRP with respect to Chanen's performance and right to payment. Chanen filed a lien against the hotel and, in March 1976, HRP responded by filing suit against Chanen alleging that it did not owe Chanen any money and that, because of cost overruns, Chanen owed HRP money. 5/8 Tr. 49; 5/13 Tr. 17. Because HRP and Chanen were adverse in this lawsuit, Greenfield (and Snell & Wilmer more generally) declined to represent either one of them. 5/7 Tr. 99-100; 5/8 Tr. 49-50; 5/14 Tr. 140. Accordingly, each retained separate counsel. 5/7 Tr. 100; 5/8 Tr. 50. Pursuant to the parties' contract, the case was referred to arbitration. 5/7 Tr. 99; 5/8 Tr. 49; 5/13 Tr. 17-18.

Chanen and HRP settled their dispute in October 1977. P. Exh. 60; 5/13 Tr. 7. Under the terms of the settlement, HRP agreed (1) to safeguard the forms until final disposition of the Form-Eze litigation or until earlier disposition of the forms by agreement and (2) to indemnify Chanen and hold it

harmless from any recovery by Form-Eze or Inryco based upon the alleged wrongful conversion of the forms. P. Exh. 60; 5/8 Tr. 68-70. HRP did not agree to indemnify Chanen from any recovery that resulted from any fault on the part of Chanen. P. Exh. 60; 5/8 Tr. 70.

5. *The Trial of the Form-Eze Case.* On July 1, 1978, Greenfield and others left Snell & Wilmer and formed Craig, Greenfield & Irwin ("CG&I"). 5/13 Tr. 95. By now, Greenfield had been advised that HRP's insurer, Arizona Title Insurance Company ("Arizona Title"), would be managing the Form-Eze litigation for HRP. 5/14 Tr. 173-174. Thereafter, Greenfield met with Arizona Title representatives, sent his bills to Arizona Title, and provided Arizona Title with written reports regarding the status of the case. 5/14 Tr. 180-185; P. Exhs. 77, 78, 84, 85, 90; D. Exhs. 230, 232. Greenfield sought and received instructions from Arizona Title in-house counsel regarding defense strategy, including the decision to try the case before a Special Master. 5/14 Tr. 180-183.

The parties tried the Form-Eze case before a Special Master on March 19-27, 1980. 5/13 Tr. 96. On December 8, 1980, the Special Master announced that he had found in favor of Form-Eze and Inryco and against both Chanen and HRP. 5/13 Tr. 96; 5/15 Tr. 108; P. Exh. 97. The Special Master requested that Form-Eze and Inryco prepare proposed findings of fact and conclusions of law. P. Exh. 97, at 22-23, 28.

6. *Proceedings After Greenfield Joined Winston & Strawn.* On March 1, 1981 — six years after Chanen and HRP agreed to Greenfield's joint representation in the Form-Eze litigation, almost a year after the completion of the trial and three months after the Special Master announced his finding that HRP and Chanen were liable — the CG&I attorneys, including Greenfield, joined Winston & Strawn. 5/13 Tr. 95; 5/14 Tr. 79. Prior to that time, Winston &

Strawn had no involvement with Chanen, HRP, Greenfield or the Form-Eze litigation.

Because the trial already had occurred and the Special Master had indicated his intention to impose liability jointly and severally against HRP and Chanen, Greenfield's involvement in the Form-Eze litigation after joining Winston & Strawn was extremely limited. On March 2, 1981, the day after he joined Winston & Strawn, Greenfield filed with the Special Master a 36-page response to the proposed findings of fact and conclusions of law, reiterating arguments previously made numerous times on behalf of Chanen and HRP. P. Exh. 100. Although he again argued briefly that Chanen should not be liable on the contract claims because it was the disclosed agent of HRP (*id.* at 29-30), the overwhelming majority of the brief was devoted to contesting the liability findings against *both* defendants. On June 25, 1981, the Special Master held a hearing on damages. Michael Rollins, a lawyer who had worked with Greenfield on the Form-Eze case since October or November of 1979, attended the hearing on behalf of HRP and Chanen. App., *infra,* 7a; 5/14 Tr. 5, 12.

On September 15, 1981, the Special Master issued a report *rejecting* the "disclosed principal" argument and finding that Chanen had breached the Labor Guarantee Agreement by unilaterally dismissing Form-Eze's supervisor, that Chanen and HRP had no security interest in the forms at the time of the termination of the Labor Guarantee Agreement, and that Chanen and HRP had wrongfully retained the forms after July 1975. P. Exh. 109. The report recommended that damages in the amount of $3,600,000 be imposed jointly and severally against Chanen and HRP. App., *infra,* 7a; P. Exh. 109, at 13-14; 5/7 Tr. 140, 145-146. Of that total, only approximately $120,000 were for the contract claims. P. Exh. 109, at 10, ¶¶ 69-70; 5/14 Tr. 68-69. The remaining amount constituted tort damages. P. Exh. 109, at 12-13, ¶¶ 79-85. Greenfield objected to the report on

numerous previously asserted grounds, each of which the Special Master rejected. P. Exhs. 110, 112.[4]

After HRP and Chanen each retained new counsel to represent them separately, the district court adopted many of the Special Master's findings but reduced the amount of damages to approximately $800,000. P. Exhs. 261, 125. The Ninth Circuit later altered the amount of damages assessed against Chanen and HRP to $1,600,000. P. Exh. 126; 5/7 Tr. 149. Of this amount, HRP ultimately paid $265,836.40 to Form-Eze and $546,071.87 to Inryco. P. Exhs. 130, 131; 5/7 Tr. 149-150. From the time the Ninth Circuit's decision became final until the statute of limitations ran six years later, HRP was fully entitled to bring an indemnification action against Chanen. 5/9 Tr. 137; 5/16 Tr. 58-61. HRP opted not to do so. 5/8 Tr. 89-90; 5/9 Tr. 137.

7. *Respondents Sue Winston & Strawn.* On December 30, 1987, respondents filed this malpractice action against Greenfield and CG&I, alleging that Greenfield had acted negligently with respect to his representation of HRP in the Form-Eze litigation. Even though Greenfield had joined Winston & Strawn more than 5½ years after he had begun his joint defense of HRP and Chanen and several months after the Special Master had announced his intention to find HRP and Chanen jointly liable in the Form-Eze litigation, respondents included Winston & Strawn as a defendant.

Prior to trial, Greenfield and CG&I settled the claims against them for a total of $1,500,000, which more than covered HRP's liability to Form-Eze and Inryco. App., *infra,* 9a. Respondents unilaterally allocated $500,000 of the

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[4] Although Greenfield again raised the "disclosed principal" theory — no doubt for preservation purposes only at this point — the overwhelming percentage of each filing was devoted to arguments designed to absolve *both* defendants of liability. See P. Exhs. 110, 112.

settlement to compensatory damages and $1,000,000 to punitive damages. *Id.* at 9a.

At the trial against Winston & Strawn, respondents focused entirely on whether Greenfield had committed malpractice in representing both HRP and Chanen in the Form-Eze litigation. Respondents presented no evidence that Winston & Strawn had anything to do with HRP, Chanen, Form-Eze or Greenfield before Greenfield joined the firm on March 1, 1981 — 5½ years after the initiation of the litigation and well after the Special Master had resolved liability. Further, their case being premised strictly on the doctrine of respondeat superior, respondents presented no evidence suggesting that Winston & Strawn had employed inadequate conflict-checking procedures at the time Greenfield joined it or that anyone at Winston & Strawn other than Greenfield acted wrongfully after Greenfield joined the firm. Instead, respondents simply concentrated on demonstrating the continuation of Greenfield's conflict of interest after that point in time.

Respondents' expert witnesses testified that Greenfield fell below the standard of care by representing both Chanen and HRP in the face of a conflict of interest. These witnesses focused in particular on Greenfield's invocation of the "disclosed principal" defense on behalf of Chanen and his failure to present a cross-claim for indemnification on behalf of HRP based on the AIA contract between HRP and Chanen. 5/8 Tr. 117-126, 138-141, 145-146, 165; 5/9 Tr. 16-37, Tr. 104-116. One of those witnesses conceded, however, that neither Greenfield nor anyone at Winston & Strawn could have done anything to relieve HRP of liability in the Form-Eze litigation after Greenfield joined Winston & Strawn on March 1, 1981. 5/8 Tr. 185. Another testified that, "if on March 1 Mr. Greenfield had woken up to the fact that there was no colorable basis on which HRP was holding the form work," he could have saved HRP three-months' worth

of damages for the rental value of the forms. 5/9 Tr. 74-75.[5] No witness testified that HRP's injury was proximately caused by any act or omission on the part of Greenfield after he joined Winston and Strawn.

Respondents' closing arguments focused almost exclusively on Greenfield and his alleged misconduct during the entire course of the Form-Eze litigation. Respondents turned to Winston & Strawn only when addressing the issue of punitive damages. In that regard, respondents' counsel repeatedly urged the jury to punish Winston & Strawn on improper grounds. For example, he began his summation by suggesting that the jury could express its outrage about completely unrelated injustices by punishing the out-of-state lawyers at Winston & Strawn, stating:

> I don't know how you feel about life, but if you have any sense of life as I live it, I have a sense of a lack of control. **I cannot do much about the savings and loan scandal except I guess pay taxes until the day they put me down.** I suspect you probably don't have any more control over that than I do.
>
> **And I must sit by, and I suspect you must also, and let whatever punishment is going to be meted out to our state legislators for the AZScam scandal.** And I cannot go in and plead to the judge

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[5] It is questionable indeed whether Greenfield's failure to give up on the contention that the Labor Guarantee Agreement entitled HRP and Chanen to hold the forms — which was based in part on the advice of a U.C.C. expert at his prior firm — was even negligence, let alone a departure from the standard of care so extreme as to serve as a basis for punitive damages. In any event, this alleged failing was wholly unrelated to the only contention that could support punitive damages — that Greenfield conducted the litigation so as to protect his favored client, Chanen, at the expense of HRP. To the extent Greenfield erred by failing to advise HRP to return the forms, his error harmed HRP and Chanen equally.

> that there should be either probation or perhaps a stiffer sentence. I suspect, likewise, you can't.
>
> But this case by the coincidence of your jury service and the fact that this case came to this courtroom at this time gives you an opportunity actually to make a statement, a statement that goes far beyond Barry Shapiro or Arthur Greenfield or Winston & Strawn.
>
> * * * * *
>
> I suggest that this case gives you the opportunity to tell lawyers that they have more than lip service responsibility to the Code of Professional Responsibility. I suggest further that this decision involving as it does one of the most powerful law firms in the country, Winston & Strawn, it's a decision that will be studied not only in Phoenix, Arizona or the state of Arizona, but certainly **in Chicago where it has its main office and certainly in Washington where it has a significant presence**.

5/20 Tr. 4-6 (emphasis added). He concluded his opening summation on the same lawyer-bashing note, stating: "I'm going to ask you, and again this isn't going to make me very popular at the bar convention, to **send a message to all lawyers**." *Id.* at 33 (emphasis added). See also *id.* at 73 ("[P]lease, I have watched all my life, representing plaintiffs as I do, **the rich and the powerful get away with it**. Don't let it happen here.") (emphasis added); *id.* at 81 (one answer jury can give is "we let the lawyers get away with it again").

Unable to identify any misconduct on the part of Winston & Strawn to justify a large punishment, respondents' counsel based his request for a multimillion dollar punitive windfall exclusively on Winston & Strawn's financial worth, stating: "I'm going to tell you in a moment the gross revenues of Winston and Strawn. They're going to amaze you. They are rich and they are powerful." *Id.* at 15. He then unabashedly

encouraged the jurors to express their antipathy to wealthy lawyers by punishing Winston and Strawn:

> I haven't talked a lot about the power of Winston and Strawn, but when you look at Exhibit 265, consider $96 million a year is what Winston and Strawn makes in gross revenues. Actually goes over 97. Winston and Strawn's net worth runs to the tens of millions of dollars.
>
> If you are going to send a message to say this conduct will not occur again, you have to reflect that this is a very large company. $10,000, $500,000, you're not even going to get their attention. **They're not going to look up from their coffee. They're not going to rearrange their European vacations.**

Id. at 29 (emphasis added).

At the close of trial, the court instructed the jury, over Winston & Strawn's objection, that Winston & Strawn was strictly liable for punitive damages under the doctrine of respondeat superior. 5/20-21 Tr. 10-11; 5/16 Tr. 77-79. The following day, the jury returned a verdict in favor of HRP in the amount of $1,238,568 in compensatory damages and $3,000,000 in punitive damages. 5/20-21 Tr. 19.

Winston & Strawn then filed its post-trial motions, which the trial court denied, although not without reservations. In particular, on the issue of Winston & Strawn's liability for punitive damages, the court stated (App., *infra,* 54a):

> There is no question but that the award of punitive damages in this case against Winston & Strawn was based solely upon a theory of *respondeat superior*. There was no claim that Winston & Strawn acted negligently or punitively other than through the actions of Greenfield. While this Court has substantial doubts as to whether the purposes

> behind the award of punitive damages are served by the application of *respondeat superior,* particularly when the party whose conduct is the basis for the award of punitive damages is an experienced lawyer whose conduct is not subject to the same kind of supervision and close scrutiny as the conduct of many other types of employees, this Court is bound by appellate authority on this issue.

The court also summarily rejected Winston & Strawn's argument that the $3 million punishment was unconstitutionally excessive. Focusing solely on Winston & Strawn's financial condition, the court explained that "[a]lthough the amount of punitive damages awarded is large, based on the evidence presented concerning the financial worth of the Defendant, the amount can not be said to be indicative of passion or prejudice, but upon the jury's consideration of the instruction and the purpose for which punitive damages are assessed." App., *infra,* 54a.

The trial court did order that the punitive exaction be offset by the $1 million that had been allocated to punitive damages in the settlement with Greenfield. App., *infra,* 55a-56a. It also required that the compensatory award be offset by the $500,000 that had been allocated to compensatory damages in the Greenfield settlement. *Id.* at 55a.

7. *The Arizona Court of Appeals' Decision.* A divided panel of the court of appeals affirmed the jury's compensatory and punitive damages awards. Adhering to the position that punitive damages may be imposed on a pure vicarious liability theory, the majority held that "[t]here is clear and convincing evidence that in representing both HRP and Chanen, Greenfield consciously disregarded HRP's rights under the AIA contract and exposed HRP's partners to unjustifiable risks of personal liability." App., *infra,* 21a.

The majority then held that the amount of punitive damages did not violate Winston & Strawn's due process rights, stating:

> The award is proportionate to Winston & Strawn's financial position; it represents approximately 3.1 percent of the firm's gross revenues for 1990. The record supports the jury's determination that for almost a year Winston & Strawn, through Greenfield, consciously disregarded its client's interests, tried to shift all liability for a potential $3.6 million judgment from a more favored client to HRP, and concealed this conduct from HRP. The punitive damage award is less than half of what HRP requested, less than three times HRP's compensatory damages, and significantly less than the liability that Greenfield sought to have HRP bear. We conclude that the award serves the goals of punishment and deterrence without financially devastating Winston & Strawn.

App., *infra,* 27a (footnote omitted).

Finally, although affirming the setoff against the compensatory award (*id.* at 34a-38a), the Court of Appeals reversed the setoff against the punitive exaction (*id.* at 38a-40a), thus leaving Winston & Strawn obligated to pay $3 million in punitive damages on a pure vicarious liability theory.

Judge Noyes dissented from all aspects of the decision other than the affirmance of the setoff against the compensatory damages. App., *infra,* 40a. On the issue of Winston & Strawn's liability for punitive damages, he echoed the trial court's concerns (*id.* at 41a-42a) and stated that "[w]hat happened in this trial and appeal to Winston & Strawn is reason enough to reconsider Arizona law regarding vicarious liability for punitive damages" (*id.* at 42a).

Judge Noyes also concluded that, even under a vicarious liability theory, the imposition of punishment against Winston & Strawn was unsupported by the evidence because "the real damage to HRP was done when the Special Master announced his liability verdict on December 8, 1980 — three months *before* Greenfield joined Winston & Strawn." App., *infra,* 42a-43a (emphasis in original). Judge Noyes noted that Greenfield's invocation of the "disclosed principal" defense on Chanen's behalf could not justify the verdict because "the Special Master rejected this argument, the district court rejected it, and the Ninth Circuit rejected it." *Id.* at 43a. In other words, although this alleged act of disloyalty to HRP was a central part of respondents' case, it in fact had no causal relationship to HRP's loss. Judge Noyes concluded that "[i]f there was malpractice by Greenfield regarding what he did or did not advise HRP to do with the forms, the malpractice affected Chanen and HRP equally, it was not done with an evil-minded favoring of Chanen over HRP, and it was done long before March 1, 1981 — all of which means that there is no legal reason to penalize Winston & Strawn for that behavior." *Id.* at 45a-46a.

Judge Noyes also found the amount of the punishment to be so excessive as to be "unconstitutional, a taking without due process of law." App, *infra,* 48a. He explained (*id.* at 47a-48a):

> Assuming that the evidence supported any award of punitive damages for Greenfield's evil-minded conduct after March 1, 1981, the gross (or net) revenues of Winston & Strawn are an unfair measure of punishment. By comparison, all direct and vicarious liability for Greenfield's evil-minded conduct for the sixty-eight-month period from July 1975 to March 1981 was settled for a $1 million penalty. Winston & Strawn's exposure for Greenfield's conduct was six months, March to September, 1981. That Winston & Strawn had the

> misfortune of hiring Greenfield when it did, rather than six months later, is no reason for a $3 million penalty.

Judge Noyes had little difficulty discerning the source of the remarkable punishment in this case: it was "HRP's call to arms against rich and powerful lawyers who 'get away with it.'" App., *infra,* 46a. In his view, "[t]he jury did exactly what it was asked by HRP to do; it punished Winston & Strawn for wrongs much greater than — and wrongs completely unrelated to — the evil-minded conduct of Arthur P. Greenfield after March 1, 1981." *Id.* at 47a.

8. *Subsequent Proceedings.* On December 19, 1995, the five-member Arizona Supreme Court denied discretionary review, with one judge dissenting without opinion and one judge abstaining. App., *infra,* 57a. On January 11, 1996, the Arizona Court of Appeals stayed execution of the judgment pending the timely filing and disposition of a petition for certiorari.

REASONS FOR GRANTING THE PETITION

This is a case in which a defendant that itself did nothing at all wrong stands to be mulcted in punitive damages to the tune of $3 million for conduct that caused the plaintiffs little or no harm during the period that the principal alleged wrongdoer was associated with the defendant. The sole available "justification" for the punishment is, as the dissent below noted, that the defendant is capable of paying it. The case is a paradigm of a pervasive and malignant injustice that is all too common on the contemporary legal scene. It cries out for correction by this Court.

The Court has granted certiorari in *BMW of North America, Inc.* v. *Gore,* No. 94-896, to consider, among other things, whether the $2 million punitive damages award in that case is so excessive as to violate due process. The present petition raises a virtually identical issue. Accordingly, the Court should hold the petition for disposition as appropriate

in light of its decision in *BMW*. See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 4.16, at 192-193 (7th ed. 1993). If the Court does not reach the excessiveness issue in *BMW*, the present case would be a particularly good one in which to do so.

1. *The punishment bears no reasonable relationship to Winston & Strawn's conduct.* Even more so than in *BMW*, the punishment in this case bears no relationship whatever to the nature of the defendant's alleged "misconduct." Indeed, as both the trial court and the court of appeals specifically found, Winston & Strawn did nothing wrong *at all*. It has been held liable for a remarkable $3 million in punitive damages on a *pure* vicarious liability theory for a course of conduct that began long before Winston & Strawn merged with CG&I. Although this Court has indicated that the vicarious imposition of punitive damages is not unconstitutional (*Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 14-15 (1991)), the fact that liability is entirely vicarious is a strong indication that a multimillion dollar punishment is excessive. See *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2726 (1993) (Kennedy, J., concurring).[6]

To the extent that it is proper to consider Greenfield's conduct, rather than Winston & Strawn's (a point we do not concede), the *only* conduct of his that could be considered was in the period after he joined Winston & Strawn. See 5/20-21 Tr. 10-11. By that point, whatever conflict of interest there was had been in existence for 5½ years, the trial was over, it was far too late in the day to add a cross-

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[6] It bears noting that this, unlike *Haslip*, is a case of *pure* vicarious liability. In *Haslip*, there was evidence that the defendant insurer had received, but ignored, complaints about its agent's fraudulent activities. See 499 U.S. at 14. Here, as all four judges to review the verdict agreed, there was no evidence that Winston & Strawn did anything wrong at all. App., *infra*, 11a, 46a-47a, 53a, 54a, 55a.

claim on behalf of HRP against Chanen, and Greenfield was merely reiterating his previously rejected arguments so as to preserve them for appeal. Greenfield's failure to "wake up" on March 1 to the errors he allegedly had been making for 5½ years (see 5/9 Tr. 75) is not sufficiently wrongful to warrant any punitive damages, let alone the $3 million loss that the innocent members of Winston & Strawn will be forced to absorb if the Court of Appeals' judgment is permitted to stand.

Moreover, even if the entirety of Greenfield's conduct could be considered in evaluating Winston & Strawn's punishment (something we suspect that not even respondents would argue), it is ludicrous to suggest that his dual representation of Chanen and HRP — two entities that had a history of being represented jointly (see P. Exhs. 19, 20) — was worthy of $4 million in punishment.[7] If this were the worst instance of conflict of interest known to the legal profession, it still would amount to no more than gross negligence, which (in the absence of grave physical harm) is hardly the kind of tort one would think could result in $4 million worth of civil punishment. In fact, there can be little serious doubt that Greenfield's alleged departure from professional standards was far from the worst kind of misconduct in which an attorney can engage. Although the trial of this case took place almost six years after Greenfield was replaced as HRP's counsel, the record contains no evidence that Greenfield was even charged with a disciplinary violation by the Arizona bar, let alone found guilty of one.

In addition, although respondents' experts testified that Greenfield fell short of the standard of care for attorneys, whether or not he did anything wrong at all was a matter of serious dispute. For instance, while those experts excoriated

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[7] If the entirety of Greenfield's conduct is considered, it follows that the $1 million in punitive damages paid by Greenfield and CG&I for conduct pre-dating the merger with Winston & Strawn also should be considered.

Greenfield for failing to present a cross-claim on behalf of HRP against Chanen, we suspect that most objective observers would find little fault with Greenfield's decision to present a unified defense, while reserving matters of contribution and indemnity for later resolution between the defendants in the event of an adverse judgment. See 5/14 Tr. 56; 5/15 Tr. 28-33.[8] Indeed, because the AIA contract required that disputes between Chanen and HRP be arbitrated, neither Greenfield nor any other attorney could have presented a cross-claim on HRP's behalf.[9]

In short, the $3 million punishment against Winston & Strawn is utterly unrelated to either its own wholly innocent conduct or to Greenfield's conduct during the period after he

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[8] This is not idle speculation. The authors of a well-respected litigation guide have specifically addressed the subject:

> One of the most significant practical problems facing defendants who bring cross-claims is that they may be placed in a posture of blaming each other for the harm allegedly suffered by the plaintiff, much to the plaintiff's delight. This "finger pointing" by the defendants may cause them to carry much of the load of the litigation for the plaintiff as each defendant seeks to produce evidence showing liability by the other defendants.
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> * * * * *
>
> [T]here are situations where a cross-claim may not accrue until a defendant has been found liable (*e.g.*, indemnity actions). In that situation, there may be no pressing need to bring a cross-claim which will serve only to destroy the "united front" of the defendants.

1 McCUTCHEN, DOYLE, BROWN & ENERSEN, FEDERAL LITIGATION GUIDE ¶1.18, at 1-131 to 1-132 (1996).

[9] By contrast, the "disclosed principal" theory was a defense to the contract claims of Form-Eze and Inryco and therefore had to be raised in the main litigation or not at all.

joined Winston & Strawn. Indeed, the aggregate $4 million in punishment is grossly disproportionate to the gravity of Greenfield's overall misconduct. Accordingly, if the Court concludes that the punishment in *BMW* is excessive in relationship to the petitioner's conduct, that holding surely would require a remand in this case.

2. *The punitive damages are disproportionate to the injury caused to HRP by conduct occurring after Greenfield joined Winston & Strawn.* The Court of Appeals defended the $3 million exaction by comparing it to the amount of compensatory damages awarded to respondents. App., *infra*, 27a. We do not for a moment suggest that the relationship between the punitive damages and the harm caused by the defendant's misconduct is not an extremely important factor. But the Court of Appeals flubbed the comparison. The record reflects that very little, if any, of the $1.2 million in compensatory damages was caused by conduct of Greenfield after he joined Winston & Strawn on March 1, 1981.[10] To the contrary, one of respondents' experts conceded that there was nothing that could have been done after March 1 that would have prevented HRP's injury. 5/8 Tr. 185. The only other witness to offer an opinion on the subject suggested that three-months' worth of tort damages — roughly $6,660[11] —

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[10] Winston & Strawn was held liable for HRP's entire $1.2 million loss because the Arizona courts concluded that Winston & Strawn assumed CG&I's liabilities when the two firms merged. See App., *infra*, 28a-31a, 50a.

[11] Under the Ninth Circuit's judgment, Chanen and HRP were jointly and severally liable for "detention" damages computed by multiplying the value of the forms by the statutory interest rate (10% per annum). P. Exh. 126, at 18-19, ¶¶ 3, 6; P. Exh. 125, at 2-3, ¶¶ 4-5. The value of the forms was $532,625.28 (P. Exh. 126, at 18 (¶¶ 2, 5), so the interest on that sum for three months is $13,315.63. Because Chanen and HRP each paid half of the judgment (5/8 Tr. 89-90), HRP's injury as a result of Greenfield's failure to "wake up" on March 1 and advise it to return the forms was $6,657.82.

could have been averted had Greenfield suddenly woken up on March 1, 1981, abandoned his legal position of four years, and advised his clients to return the forms to Form-Eze. 5/9 Tr. 74-75. Accepting arguendo that his failure to do so was punishable misconduct at all (but see page 11 note 5, *supra*), the punitive damages are **450** times the amount of damages caused to HRP in the period after Greenfield joined Winston & Strawn. If the Court holds the 500:1 ratio in *BMW* to be excessive, that holding will surely bear on the appropriateness of the equivalently startling ratio involved here.

3. *The punishment bears no relationship to Winston & Strawn's "profit."* The $3 million punishment in this case also is grossly disproportionate to the net revenue that Winston & Strawn earned from Greenfield's joint representation of HRP and Chanen. Although the exact amount of fees earned by Winston & Strawn is not in the record, other figures in the record reflect that it was modest. For example, from the time that Arizona Title took over HRP's defense in mid-1978 through the time that Greenfield was replaced as HRP's counsel in late 1981, Arizona Title paid a total of $76,094.44 in fees to CG&I and Winston & Strawn *combined*. P. Exh. 1; 5/7 Tr. 152-154; 5/8 Tr. 90.[12] Given that most of the legal work (including the trial before the Special Master) was done before Greenfield joined Winston & Strawn, it is manifest that only a small portion of the $76,000 was paid to Winston & Strawn. As for Chanen, the record reflects that CG&I billed it only $48,000 *for all matters* in the year before CG&I merged with Winston & Strawn. P. Exh. 263, at 7. Because the trial occurred in that year, it is inconceivable that Winston & Strawn received a substantial amount of fees from Greenfield's representation of

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[12] HRP later reimbursed Arizona Title that amount plus interest. 5/7 Tr. 152-154. HRP sought and received the amount it paid to Arizona Title as part of its damages in this case. See P. Exh. 1; 5/7 Tr. 152-154; 5/8 Tr. 90.

Chanen after he joined Winston & Strawn. Even making the unrealistic assumption that Winston & Strawn earned $48,000 from Chanen and an equal amount from HRP in 1981, the punitive damages would be more than **30** times those legal fees and an even higher multiple of net revenues, the true measure of Winston & Strawn's "profits." A punishment that is so disproportionate to the "ill-gotten" gains is constitutionally suspect.

4. *The Court of Appeals' attempt to justify the punishment by reference to Winston & Strawn's wealth serves only to underscore the need for and appropriateness of review in this case.* The Court of Appeals justified the $3 million punishment principally on the basis of Winston & Strawn's substantial annual revenues, as if earning money from the practice of law itself were the tort for which Winston & Strawn were being punished. App., *infra,* 27a. As Justice White recently recognized for a unanimous panel of the Eighth Circuit, however, "a defendant's wealth cannot alone justify a large punitive damages award." *Pulla* v. *Amoco Oil Co.,* 72 F.3d 648, 659 n.16 (8th Cir. 1995).

This Court repeatedly has expressed concern about the role of an organizational defendant's financial condition in the setting of punitive damages. See, *e.g., Honda Motor Co.* v. *Oberg,* 114 S. Ct. 2331, 2340-2341 (1994) ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses"); *TXO,* 113 S. Ct. at 2723 (plurality opinion) ("[w]e agree with TXO that the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations"); *id.* at 2736-2739 (O'Connor, J., dissenting); *Haslip,* 499 U.S. at 6, 19, 22 (repeatedly noting in the course of upholding Alabama's procedures that Alabama does not permit juries to take wealth into account in setting punishment). The present case is proof positive that the Court's concern is not misplaced. Because the only explanation for the massive

exaction in this case is Winston & Strawn's size (and the jury's antipathy to lawyers), this case presents a unique opportunity for the Court to rein in the excessive, unfair, and irrational weight given to financial condition in the punishment of organizational defendants.

5. *The punitive exaction cannot be justified by reference to Arizona's interests in retribution and deterrence.* The Court of Appeals stated that the $3 million exaction against Winston & Strawn "serves the goals of punishment and deterrence." App., *infra,* 27a. That conclusory assertion is frankly inexplicable. Because it is undisputed that Winston & Strawn did nothing wrong, the notion that Arizona has *any* interest in punishing it is absurd. As for deterrence, there is not the slightest bit of evidence to suggest that *any* punitive damages are necessary to induce Winston & Strawn to comport itself with the highest standards of professional integrity.[13]

Even if there were a basis for concluding that *some* amount of punitive damages might advance Arizona's legitimate interests in punishment and deterrence, a punitive exaction is not constitutional merely because it "serves" deterrent and punitive purposes. Under such an approach, "apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." *TXO,* 113 S. Ct. at 2719 (plurality opinion) (emphasis in original). The proper inquiry is whether the punishment is "*greater than reasonably necessary* to punish and deter." *Haslip,* 499 U.S. at 22 (emphasis added). See also *TXO,* 113 S. Ct. at 2720 (plurality opinion) (endorsing a "reasonableness" standard). The Court of Appeals offered no explanation — and we can

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[13] In this regard, we must repeat that there is no evidence that Winston & Strawn's procedures for evaluating merger partners were lax or that it had insufficient safeguards in place to monitor the conduct of attorneys once they joined the firm.

imagine none — as to why $3 million does not grossly exceed the amount "reasonably necessary to punish and deter." Its cavalier statement that the $3 million jury-imposed fine in this case "serves" the deterrent and retributive functions underscores the need for further guidance in this area.

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In sum, the $3 million exaction in this case is a paradigm of excessiveness. If this Court reaches the excessiveness issue in *BMW* and rules in favor of the petitioner, that ruling surely will require a remand in this case for further consideration. If the Court does not reach the excessiveness issue in *BMW*, this case would be an excellent vehicle for addressing the issue.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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